No. 4249

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEET GROWERS SUGAR COMPANY, (*a corporation*),
Defendant,
Plaintiff in Error,

vs.

COLUMBIA TRUST COMPANY, (*a corporation*),
Trustee, Plaintiff,
and
E. D. HASHIMOTO, *Intervenor*
and
A. V. SCOTT, *Receiver,*
Defendants in Error.

Brief of Appellee

A. V. SCOTT, *Receiver*

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I

STATEMENT OF FACTS

It is necessary to amplify the statement of facts made by the appellant so as to give the court a clearer view of the situation.

The mortgage described in plaintiff's complaint contained a covenant that upon filing a bill in equity or the commencement of any judicial proceedings to enforce any right of the trustee or of the bond holders under the mortgage, that the trustee should be entitled to the appointment of a receiver with such power as the court should confer. The complaint prayed for the appointment of a receiver. In its answer the defendant consented to the appointment of the receiver.

Printed Transcript Page 18, *Sec.* 5 *and Pages* 30-31.

Thereupon A. V. Scott was appointed as such receiver. E. D. Hashimoto, a holder of shares of the preferred stock of the defendant Beet Growers Sugar Company, was permitted to intervene, and in his complaint in intervention it was alleged, substantially, that the intervenor represented an association of preferred stockholders of the defendant Beet Growers Sugar Company which had been organized for the purpose of acting in concert to protect the interests of all of the preferred stockholders; that under the articles of incorporation the said company had provided for two hundred thousand shares of preferred stock of the par value of $10.00 per share, and that about one hundred twenty thousand shares of said preferred stock had been sold, and the holders thereof had invested in said enterprise cash to the amount of $1,200,000.00; that the value of the assets of the company did not exceed the sum of $1,200,000.00, and that

the debts of the said company, secured and unsecured, amounted to approximately $600,000.00; that there was no equity or value in said property after the payment of debts, for division among the common stockholders—any equity remaining after the debts were paid being less than sufficient to pay and satisfy the preference of the preferred stockholders; that the preferred stockholders were entitled to seven per cent cumulative dividends before there could be any distribution of dividends to the common stockholders, and, likewise, the preferred stockholders had the preference to distribution of moneys arising out of any sale of the capital assets of the defendant to satisfy accumulated dividends and the principal investment up to the par value of the shares, before any distribution of assets could be made to the common stockholders.

It was further alleged that since the appointment of the receiver the board of directors of the corporation had ceased to function; that disputes had arisen between groups of stockholders, and that no one was vested with power or authority to determine the rights and priority of the preferred stockholders, or to reconcile or determine the rights of the conflicting groups of stockholders; that the good will of the business and sugar factory was of great value, and that the same "will be dissipated and wholly lost unless contracts are made for the season of 1923 with beet growers in the adjacent territory;" that many of the common creditors of the corporation held part of the bonds secured by the mortgage sought to be foreclosed in the action as security for their claims, and that in many instances the amount of bonds held as security was twice or three times the amount of the entire indebtedness due from the corporation to its creditors, and that said creditors were proceeding to sell the bonds pledged so as to acquire title thereto; further alleged: "As to the remainder of said bonds a portion thereof have wrongfully been taken by officers of the company who hold the same to protect and secure their al-

leged personal claims against the defendant, Beet Growers Sugar Company, which alleged claims represent but a small proportion of the face value of the said bonds so taken, and in taking the same the said officers wrongfully and improperly, and to the prejudice of the creditors of said company, pledged to themselves as creditors, and have assumed to act in the taking as officers, when in fact incompetent so to act because of their personal interest."

It was further alleged that "the bond holders, the trustee and all parties were anxious to have contracts made with the beet growers in adjacent territory so that the good will of the corporation might be preserved, and were willing and desirous in the event that the court should so order to have the expense thus incurred made a part of the expense of the administration of the estate underlying the mortgage debt." Part of the prayer of the complaint in intervention read as follows:

"2. That in the meantime and pending final decree herein, the receivership herein be extended, and the said receiver clothed with the powers of a general and operating receiver; and that all creditors be required to present their claims, the same to be adjudged and determined in this action—to the end that the rights of all and every person interested in the property of said corporation be now and herein determined."

On February 26th, 1923, no motion, demurrer, plea or answer had been filed to the complaint in intervention, and no appearance made in opposition thereto, on motion of the solicitors for the intervenor, it was ordered and decreed that the complaint in intervention be taken *pro confesso* as to the defendant and appellant Beet Growers Sugar Company, A. V. Scott, receiver of the defendant, and the Columbia Trust Company, plaintiff.

The complaint in intervention aforesaid was filed with the consent of all parties, and the purpose and effect there-

of was to wind up the affairs of the corporation by sale of its property, and for an equitable distribution of its assets, first, to its creditors secured and unsecured, and second, to its preferred stockholders. This purpose was later admitted by the appellant in its answer to the petition of the intervenor to sell the property of the defendant company. See paragraph 3 page 63 printed transcript, from which we quote as follows: "This defendant admits that the complaint in intervention of the said intervenor was filed with the intention and for the purpose of winding up the affairs of this defendant by a sale of its property."

The petition of the intervenor to extend the powers of the receiver so as to carry out the purpose of the complaint in intervention was presented to the court and a hearing thereon ordered for December 30th, 1922. Notice thereof was given and served upon all the parties to the action, and at the time set for the hearing of said application no objection having been made to the granting of the order, the powers of the receiver were enlarged, and he qualified.

April 17th, 1923, an order was made by the court after a hearing at which the defendant Beet Growers Sugar Company was represented, appointing an examiner of the court to take testimony as might be offered by the respective parties to the cause or holders, whether as pledgees or owners, of the bonds of the defendant Beet Growers Sugar Company as were then issued and outstanding, in relation to the ownership of such bonds or the validity of pledges under which the same were held; and also in relation to the amount and validity of the claims against the defendant which were secured by a pledge of such bonds. This order was approved by the attorneys for the defendant and appellant Beet Growers Sugar Company.

Under the order enlarging the powers of the receiver he was directed to call for claims of creditors against said Beet Growers Sugar Company, and publish and mail no-

tices to creditors to present their claims within sixty days after the first publication of the notice under penalty of having the same disallowed in the discretion of the court.

Afterwards the receiver was ordered and directed to advertise for bids for leasing of the property for the sugar making campaign of the year 1923. Contracts were made with farmers to grow beets to supply the raw material, the necessary funds were advanced by the Association of Preferred Stockholders, and in September, 1923, a lease was made by the receiver to the Association of Preferred Stockholders, and the factory was operated during the fall of 1923; a similar lease was made for the campaign of 1924.

The property covered by the mortgage to the plaintiff was both real and personal: "All comprising parts of a single working plant or utility, to wit: A sugar factory, in which each part is necessary to give value to the others, including the good will and both the real and personal property, and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts."

December 28th, 1923, the court made and entered a memorandum decision appearing at page 86 of the printed record, in which the status and affairs of the Beet Growers Sugar Company was analyzed, and the question of whether the property should be sold without redemption was considered and discussed by the court, and the following conclusion indicated by quotation from the decision was reached: (Page 92 printed record). "It is apparent that the common stockholders and the company, in so far as it represents only the common stockholders, have no real interest in the question of whether the sale be made with or without redemption, for the aggregate of the secured claims, the unsecured claims, the taxes, and the unpaid expenses of the receivership and of the trustee, taken together with the amount of outstanding preferred stock, which must be paid

before anything could go to the common stock, will very greatly exceed the amount which there is any reason to expect could be gotten for the property at a sale, either with or without redemption. In view of the heavy indebtedness of the receivership if we take into consideration the large item of taxes which the receiver has now been directed to pay by the issuance of receiver's certificates, constituting a first lien upon the property, I am inclined to the view that I should before resorting to foreclosure sale, attempt a receiver's sale, the same to be without redemption. The considerations brought forward for an expeditious disposition of the property, finally and absolutely, are very cogent. Some preparations must be made within the near future for the season of 1924, or the plant will be idle for a year with a very great incidental loss."

In short, the court concluded that a receiver's sale without redemption should be authorized at an upset price, and a hearing was ordered to be held on the 7th of January, 1924.

An order was made authorizing the receiver and the auditor of the company to determine the total amount of unsecured claims and report to the court.

On January 19th, 1924, the court made a memorandum order of sale of the property by the receiver, in which it was suggested that the original conclusion reached by the court should be adhered to, and that a sale should be made by the receiver. Suggestions were invited from all parties of record, and a draft of a proposed order of sale by the receiver was served on each party of record, and thereupon under date of January 25th, 1924, the court made its order for a sale by the receiver fixing an upset price of $650,000.00, and containing this recital:

"8. And it fruther appearing that it will be necessary to sell all of the property of the defendant Beet Growers Sugar Company to pay said indebtedness, and that said prop-

erty constitutes a single operating unit, and should be sold together in one parcel, and that in view of the status and exigencies of the case a better price can in all probability be gotten by the Receiver than by a Master upon foreclosure sale, and that by a Receiver's sale the rights of all parties interested may be more fully protected."

The order fixed the terms of the sale and made the following provision in respect to redemption: "Redemption: It being considered that if possible the sale should be made subject to the right of redemption by parties interested, such right to be exercised within a reasonable time and upon reasonable terms, with reasonable inducements to the purchaser to make the purchase subject to such right; and it being thought that the upset price so fixed will be sufficient to cover all indebtedness of the company, and that therefore in addition to the company the only interested parties are the preferred stockholders, who have rights and interests that the company may not be willing or able to protect; and it also having been shown that it is highly important that the sugar company be kept a going concern and that it operate each year, and that to that end it is necessary to contract with farmers for the raising of sugar beets, beginning about February first of each year for the season's run of the current year, and that therefore a period of redemption longer than six months would extend into the 1925 season and hence jeopardize operations for that year;

"It is further ordered that the said sale be made subject to the right of redemption, such right to be exercised within six months following the date of the aproval of the sale. A redemptioner was required by the terms of the order to pay the purchaser "not only the purchase price in full which the purchaser has paid for the property, but interest thereon at the rate of ten per cent from the date of approval of the sale, and, in addition thereto, the sum of $15,000.00."

It was stated that the right of redemption in the order provided for was intended primarily for the protection of the preferred stockholders and all of them, and for their benefit, and was granted upon the condition and the with the reservation that it should not be assigned, transferred or encumbered without the consent of the court first obtained.

March 1st, 1924, the property was sold for $800,000.00, which was $150,000.00 more than the upset price fixed by the court.

In the meantime during the time the advertisement of sale was running, a supplemental order of sale was made by the court calling attention to the fact that the factory had then been leased by the receiver, and contemplating bidders were notified of the fact, and providing that in case of redemption the redemptioner and not the purchaser at the sale, should be entitled to the rentals which were to be paid by the lessee subsequent to the date of sale.

The sale was had, confirmed, and the time for redemption having expired and there having been no redemption, conveyances of the property have been executed and delivered by the receiver.

When the present appeal was taken no supersedeas was granted, and in the month of May, 1924, the appellant made application to this court for a supersedeas bond and after hearing, on consideration the same was denied.

II

ARGUMENT

FIRST PROPOSITION.

THE SALE WAS MADE AS A RECEIVERSHIP SALE, AS THE ORDER CLEARLY DISCLOSES, AND WAS NOT A FORECLOSURE SALE. SEE ALSO STATEMENT OF PROCEEDINGS IN TRANSCRIPT.

No final judgment has been entered in this case. No foreclosure of the mortgage has been decreed and none can be had. The plaintiff presented his claim to the receiver; it was allowed and paid out of funds derived from the receiver's sale of the property. No execution has issued, and none can be issued for all of the debts of the appellant have been paid.

A receiver was appointed with the consent of appellant; the action was converted into a general receivership for the purpose of protecting and determining the rights of all interested parties and winding up appellant's affairs; the appellant consented to this procedure and a decree *pro confesso* was entered against it.

Appellant made no defense to these important matters; it made no objection to the enlargement of the powers of the receiver, and the necessary order was subsequently made, entered and, ultimately, the necessary details were carried out to accomplish the result which the general receivership sought to attain, so that this appeal really constitutes an objection to a matter of detail. There is no question here of the power of the court to order the sale to be made. The court acquired jurisdiction to sell when it took the property into its possession. First Nat. Bank vs. Bunting & Co., 7 Ida. 387, 63 Pac. 694. The property was

in the possession of the court with the consent of all parties, the order directed its sale by the receiver, it was sold, the sale was confirmed, the receiver made a deed and the property was delivered to the purchasr. The time for the defendant to have objected to a general receivership for the express purpose of accomplishing what has been done, passed with the entry of the order that judgment against the defendant be taken *pro confesso* on the bill of the intervenor. Appellant might have objected to the granting of the order for the enlargement of the powers of the receiver, but appellant will not now be heard to object to a detail of administration. As was said by Mr. Justice Brewer in the case of Gila Bend Reservoir and I. Co. vs. Gila Water Company, 205 U. S. 279: "A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled."

There cannot be the slightest doubt that the sale was made as a receiver's sale. The order directing the sale is entitled: "Order for Sale by Receiver," and it recites reasons which induced the court to conduct the sale of the property by the method adopted. It contains this language: "It is therefore ordered that the receiver be and he is hereby authorized and directed, with all reasonable dispatch, to make a sale of said property, subject to the approval of the court." It was further provided that the sale should be made at such time as the receiver might designate between certain hours of the day; it fixed the manner in which the receiver should give notice of the sale, by publication in designated newspapers; it provided that the notices should contain the further statement that the sale would be made upon the terms and subject to the conditions and directions of the court, and that copies of those orders would be furnished by the receiver to any interested person applying to him; it further vested the receiver with power to adjourn the sale from time to time to a date certain; it provided that an inspection of the property might be made by intending bid-

ders prior to the sale, subject to such reasonable requirements as the receiver might prescribe; it provided that immediately upon the announcement by the receiver of the acceptance of a bid subject to the court's approval, the bidder should pay to the receiver $10,000.00 to be credited upon the purchase price if the court should approve the sale, and pay the residue of the purchase price as in the order specified. It further provided that a certain amount of the purchase price might be paid by delivery to the receiver of receiver's certificates representing outstanding indebtedness of the receiver owned by or assigned to the purchaser at their full face value, or, by certain outstanding bonds of the appellant company, or, by claims against the company secured by bonds as collateral, together with the collateral bonds. It further provided that when a sufficient amount had thus been received to cover all the indebtedness of the company, the compensation and expense of the trustee and its attorney and the unsecured indebtedness represented by the outstanding bonds and claims with collateral bonds, and the judgments against the appellant referred to in the order, the residue of the purchase price might be paid by the purchaser either in money or by the turning over to the receiver of unsecured claims at a value equivalent to the distributive share such claims would be entitled to receive were the purchase price paid in cash. Upon approval of the sale by the court and upon the order of the court, the receiver was directed to execute to the purchaser a certificate of sale with appropriate recitals of the conditions of the order relative to the redemption, and at the expiration of the period of redemption if no redemption had been made, the purchaser should be entitled to appropriate instruments of conveyance to be made either by the receiver or a special master to be appointed for that purpose, all pursuant to the further orders of the court, and it was further provided that: "and if the property be not redeemed by the defendant it will be required to execute and deliver confirmatory con-

veyances." All of the foregoing appears from the order of sale appearing in the printed transcript at page 114 to and including page 126.

The receiver actually made the sale as ordered and filed his report and prayed for an order of confirmation. A hearing was ordered in the matter of confirming the sale, and on the 15th day of March, 1924 an order confirming the sale was made and the receiver's certificate of sale was issued.

Throughout the brief of appellant language is used which, if unexplained, would lead the court to believe that the sale described was a foreclosure sale. We find this language first on page ten in the statement which, in part, reads: "In which to redeem its property from the foreclosure sale." On page 13 in the following language: "And having secured its judgment of foreclosure." Again on page 14 we find this: "And its right of redemption from the foreclosure sale." There may be others, but these suffice to call the attention of the court to what are manifest inaccuracies. No such event as the foreclosure of a mortgage has occurred.

It was thought at a certain stage of the proceedings that a decree of foreclosure might be entered, as appears by the form of a proposed decree and discussions relating thereto, which appear in the record. The idea was abandoned, however, when the court reached the conclusion that all rights and interests might be better protected and conserved by refusing to allow a foreclosure of the mortgage.

III

SECOND PROPOSITION.

UNDOUBTEDLY A RECEIVER'S SALE MAY BE MADE WITHOUT REDEMPTION.

In the case of Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705, the point was expressly decided in the following language:

> "The court had the power and jurisdiction to order that the sale be made without the right of redemption, and such order is binding on all parties to the proceedings."

As was said by Mr. Justice Harlan in Parker vs. Dacres, 130 U. S. 43:

> "In the view we take of this case it is unnecessary to express an opinion whether the provision relating to sales under execution, properly interpreted, gave a right of redemption after sale under a decree of foreclosure. If it did not, the decree below must be affirmed, *for a right to redeem, after sale, does not exist unless given by statute.* * * * * We are not aware of any such right existing at common law, or in the system of equity as administered in the courts of England previous to the organization of our government."
>
> In the Hewitt case it was said: "It is conceded that the statute of this state, no where in express terms grants the right of redemption from a receiver's sale."

The case was decided in December, 1911, and it must be conceded here that no such statute now exists.

The important feature of the case of Hewitt vs. Walters is that the supreme court upheld a receiver's sale of property without the right of redemption. It was a question of jurisdiction to make such a sale which was answered in the affirmative.

In the case at bar personal property, as well as real estate, was in the hands of the court, "all comprising parts of a single working plant or utility, to wit, a sugar factory, in which each part was necessary to give value to the others and where a dismemberment of the system would greatly impair the usefulness or value of its component parts." No statute of Idaho gave a right to redeem personal property from a sale on execution or on foreclosure.

In this situation the court was confronted with the question of determining whether it was feasible to sell the different kinds of property separately, and thus dismember the plant, and, no doubt sacrifice the good will of the business as a going concern, or, on the other hand, whether it would not be to the best interests of all the parties before it to have the receiver make the sale of the plant as a single unit. Confronted with this proposition, and, in consideration of the fact that the suit had taken the form of a receiver's suit for the dissolution of an insolvent corporation, there was no doubt but that the receiver's sale afterwards ordered, was altogether the better way to proceed.

Cases other than the Idaho case which authorize a receiver to make sales of property without redemption:

Carson vs. Alleghany Window Glass Co. 189 *Fed.* 791.

In a very similar case to that at bar which occurred in the State of Michigan and which involved a creamery, the court appointed a temporary receiver to operate the plant and to preserve the property, and to avert the danger of ruinous loss not alone to the plaintiff, but to all other creditors. The propriety of the action of the court in making the appointment was considered by the Supreme Court of Michigan in Corless vs. Clinton, Circut Judge, 212 Mich. 476, 180 N. W. 478. The appointment was upheld. Finally the state Circuit Court ordered all the property to be sold wihtout redemption, and this order was upheld in the

case of Bank of Commerce vs. Corless, 186 N. W. 717.

Reference is made by the appellant to the case of Locey Coal Mines vs. Chicago Coal Company, 22 N. E. 504, which was decided by the Supreme Court of Illinois in 1889. It was by a divided court. The dissenting opinion unequivocally held that the property should be sold as a unit and without redemption. The case, however, turned on the construction of a statute of the State of Illinois which is entirely dissimilar to any statute of the State of Idaho. We refer to the case later.

Section 6930 of the Idaho code cited by counsel for the appellant as the statute under which it claims the right to redeem from the receiver's sale is part of Chapter 257 relating to "execution of the judgment in civil actions." It makes no reference whatever to sales by receivers.

Under the provisions of Section 6932 of the Idaho code property subject to redemption may be redeemed by "1. The judgment debtor, or his successor in interest, in the whole or any part of the property."

> "2. A creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

In this case there is no one, not even the appellant, who answers the description of a judgment debtor. Neither is there any creditor having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold. It was not sold to satisfy any lien or encumbrance against it.

Furthermore: In Idaho as in other states where there is no right to redeem from sales of personal property, as was said by Mr. Justice Hawley in the case of the Pacific Northwest Packing Company vs. Allen, 116 Fed. 312:

"In such cases the auhtorities declare that the statute should receive a sensible construction; that the reason of the law in such cases should prevail over its letter," and held that, from the character, situation and surroundings it was necessary in the interest of all parties directly concerned that there should be no redemption.

Attention is called to the fact that the discussion involved in this action deals with what is called the statutory right of redemption, and not with what is denominated the equity of redemption. In the case of State vs. Stephens, 206 Pac. 1094, it was held that the statutory right of redemption is not property in any sense of the term, but a bare personal privilege.

In the case of Morrison vs. Burnette, 1907, 154 Fed. 617 at 624, Mr. Justice Sanborn speaking for the Circuit Court of Appeals for the Eighth Circuit announced the rights of the parties before and after confirmation of receiver's sale as follows:

> "The purchaser bids with full knowledge that the sale to him is subject to confirmation by the court, and that there is a power granted and a duty enforced upon the judicial tribunal when it comes to decide whether or not the sale shall be confirmed, to so exercise its judicial power as to secure for the owners of the property the largest practical returns. He is aware that his rights as a purchaser are subject to the exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

The situation presented to this court by the appellant is, in short, this: The appellant admits that in Idaho, under certain circumstances, a court of equity may order its receiver to sell without redemption. This fully admits the jurisdiction of the court in the case at bar.

With particular reference to the Locey Coal Mines case, 22 N. E. 503 cited above, counsel for the appellant devote four or five pages of their brief to a discussion of that case. We respectfully call attention to the opinion of the Illinois Supreme Court in the case of Blair vs. Illinois Steel Co., 159 Ill. 350 31 L. R. A. 269.

In the latter case the brief of counsel for appellant contained the following language:

> "The decree below directs the receiver to sell the property of the insolvent corporation without redemption, which is directly contrary to the decision in Locey Coal Mines vs. Chicago etc."

In considering the Locey case the following appears in the opinion of the court in the Blair case supra:

> "In our opinion the decision in Locey Coal Mines vs. Chicago, W. & V. Coal Co. 131 Ill. 9, 8 L. R. A. 593, does not control in this case. The decision there made was based on the statute, which expressly makes subject to the right of redemption all sales of real estate made 'by virtue of an execution, judgment, or decree of foreclosure of a mortgage, or the enforcement of a mechanic's lien, or vendor's lien, or for the payment of money.' The sale there involved was one ordered in a decree rendered upon a creditors' bill to enforce the collection of a judgment at law, and it was considered that the decree was one 'for the payment of money,' viz. the amount due on the complainants' judgment, and also considered that the creditors' bill was to be regarded a species of process for the execution and enforcement of a judgment at law. Here there was no decree of foreclosure and sale under the trust deed, even in favor of Mrs. Miller."

So that while the Locey case has been heretofore cited as authority on the proposition that a receiver cannot sell without allowing the right of redemption, it is not authority in the case at bar for the reason that, in substance and effect, the present action amounts to a creditors' suit for the purpose of winding up an insolvent corporation. The Blair case is cited in a note to 34 Cyc page 334, at the top of the first column of notes.

In Watkins vs. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862, it was held that the right of redemption is not incident to a sale by a receiver of an insolvent corporation appointed, under the statute, upon the return of an execution unsatisfied, to convert the entire corporate assets into money for the payment of a debt of the corporation.

The right of redemption is a special statutory privilege to be exercised only by the classes of persons mentioned in the statute.

Owen vs. Kilpatrick 11 *S.* 476 *at* 477.

It should be noted that the reason for making sales of property of public utilities without the right of redemption is not because of the fact that they are public utilities, but the true doctrine is that of necessity arising from the condition and character of the property, and, on account of its unity.

IV

THIRD PROPOSITION.

EVEN A FORECLOSURE SALE MAY, UNDER CERTAIN CIRCUMSTANCES, BE MADE WITHOUT REDEMPTION.

In support of this proposition it is only necessary to cite:

Continental etc. Bank vs. Corey Bros. Con. Co. 208 *Fed.* 976 *at* 984, 126 *C. C. A.* 64.

Concerning which the Circuit Court of Appeals, Ninth Circuit, said:

> "The court below had the power to make the decree and it was its duty to do so if under existing circumstances the equity of the case required it."

Pacific Northwest Pack. Co. vs. Allen, 9th Circuit 116 *Fed.* 312

Title Ins. & Trust Co. vs. California Dev. Co. (*Cal.*) 152 *Pac.* 542, 555.

V

FOURTH PROPOSITION.

INSTEAD OF INCREASING THE AMOUNT REQUIRED ON REDEMPTION UNDER THE STATUTE, THE COURT REDUCED THE AMOUNT.

On page 12 of the brief of the plaintiff in error appears what purports to be a copy of Sec. 6933 of the Idaho code. An important mistake was made in undertaking to quote the statute. It appears from the brief that on redemption of property being made there shall be paid to the purchaser the amount of his purchase with ten per cent INTEREST thereon in addition. The word "interest" does not appear in the Idaho statute. The correct quotation of the statute in this particular is as follows:

> "6933 (4492) Same: How made. The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with 10 per cent thereon in addition."

The amount which a redemptioner must pay on redemption above the purchase price is a straight penalty of 10 per

cent and the purchaser has the right to insist upon and collect this penalty in full if redemption is made one day after the sale or at any time within the year. It is not interest, but a penalty of a flat amount. A short computation will disclose to the court that the lower court undertook to lighten the burden of anyone who might redeem by reducing the penalty. The property was bid in at $800,000.00 so that if redemption had been made within the three months allowed to the plaintiff in error, three months interest on the purchase price at the rate given would have amounted to $14,000, plus $15,000 penalty; if the court had not made this special provision in favor of one who might redeem, the purchaser would have been entitled to receive ten per cent of the purchase price, or $80,000. So it appears that by the order of the court the amount required to be paid by the plaintiff in error, if it had redeemed the property, was reduced by $51,000 below what the purchaser would have been entitled to receive under the terms of the statute.

VI

FIFTH PROPOSITION.

THE UTAH-IDAHO SUGAR COMPANY WAS A COMPETENT BIDDER AT THE SALE.

The appellant contends that one of the vital questions to be decided in this appeal is whether an act of congress is nullified by the Utah-Idaho Sugar Company, charged with a violation of the provisions of the Federal Trade Act, appearing at the receiver's sale, purchasing the property of the Beet Growers Company, and receiving a receiver's deed therefor.

The order of the Federal Trade Commission referred to by appellant, was based upon a complaint which alleged a conspiracy by the Utah-Idaho Sugar Company and the other defendants in that case, in which, among other things,

an attempt was made to prevent the successful establishment of a sugar factory by the promoters of the Beet Growers Sugar Company. The evidence submitted in the lengthy hearing in that case is all based upon such allegations of conspiracy. The Federal Trade Commission, under date of October 3, 1923, entered its findings of fact and conclusions, and its order to desist, in which order it specifically enumerates the various things which the so-called conspirators are prohibited from doing.

No ingenuity of analysis can point to any one of the specific provisions of such order to prevent the action of the Utah-Idaho Sugar Company, as an individual Company, appearing at the receiver's sale and bidding for this property. The receiver's sale was duly advertised and was open to the public in general. The appellants endeavored to convince the lower court prior to the confirmation of the sale, that the purchaser was not a competent bidder and set up and discussed fully the terms of the order to desist made by the Federal Trade Commission.

The order of the Commission referred to, cited by appellants here, was made by three members of the Commission. A vigorous dissenting opinion from the minority of the Commission was rendered by Commissioners Van Fleet and Gaskill. (See printed transcript pp. 204-207). The reasoning of the dissenting opinion appears to be the better expression of the law. The Utah-Idaho Sugar Company is now prosecuting an appeal from the majority decision, such appeal being filed in the Circuit Court of the Eighth Judicial District. Appellants, in their brief, allege that, "no review was sought by the Utah-Idaho Company until after the objections were filed by the plaintiff in error on March 14, 1924. When these objections were filed and the right of the Utah-Idaho Company to become a purchaser in the receiver's sale was challenged, and when it became apparent that this right would be contested in this Honorable

Court, *"then a belated and hurried effort was made to secure a review in the Circuit Court of Appeals for the Eighth Circuit, and, as we are advised, the papers were filed upon the very last day allowed for the presentation of its petition for review."* (Appellants' brief pp. 44-45).

The record in the Federal Trade hearing referred to consisted of some 20,000 typewritten pages, together with innumerable exhibits, testimony having been taken in various parts of the United States over the period of one year. The appeal was filed in the Circuit Court of the Eighth District within six months from the date of the order to desist of the Federal Trade Commission. The Federal Trade Act provides no time within which appeals shall be taken from its various orders or decrees. The Federal Trade Commission itself, we understand, has never required that appeals from its orders must be prosecuted within the six months provided in the Judiciary Act. In fact, a careful reading of the Act itself leaves no doubt but that appeals may be taken from the Commission's orders at any time. The Utah-Idaho Sugar Company, however, did appeal within six months, and such appeal was filed in spite of the voluminous and lengthy record of such hearing, and is now being perfected. Appellant's insinuation, therefore, in the foregoing quotation from its brief that such appeal was taken because of the fact that the right to purchase this property would be contested in this Court, is without basis of reason or fact.

The Federal Trade Commission Act further provides for the specific procedure in which to carry out the terms and conditions of any orders or decrees which it may issue. In the event its orders are not carried out complaint should be made to the Commission itself, and such Commission has the proper power and authority under the procedure set forth in the Act to punish accordingly. The appellant, therefore, in event the Commission's order has not been

compiled with by the Utah-Idaho Sugar Company purchasing this factory, have their proper way of proceeding to prevent such, and certainly this Court will not now place itself in the position of the Commission to determine whether or not its, the Commission's, orders, have been complied with. It would be similar to this Court attempting to pass upon the question as to whether or not contempt of an order of the Federal Court of the Eighth District had been committed by some defendant in a case tried before that particular Court.

We are reliably informed that the appellant, or some one of its officers, did make complaint to the Federal Trade Commission subsequent to the time of the purchase of this factory by the Utah-Idaho Sugar Company at the receiver's sale. This complaint was based upon the fact that the Utah-Idaho Sugar Company by bidding at such sale was flying in the teeth of the orders of the Commission. Request was made that the Commission take some action against the Utah-Idaho Company. The Commission replied that there was nothing in the action of the purchaser in bidding for this factory, or taking deed to it from the receiver, which in any way infringed the orders of the Commission; that this was purely an *intra-state* matter, had nothing to do with *interstate* commerce, and that the Federal Trade Commission was entirely without jurisdiction in the matter.

The basis of the Federal Trade case referred to against the Utah-Idaho Company is conspiracy. Certainly appellant does not allege that there was any conspiracy with the other defendants in that case, in the Utah-Idaho Company bidding for and purchasing this factory. Do appellants believe as they ingeniously insinuate, that there was a conspiracy between the Federal Court or the receiver and the purchaser to bring about the *"culmination of the plans and purposes of said Company to destroy plaintiff in error as an independent competitor and put it as such competitor out of business."* (Appellants' brief pp. 37).

The Beet Growers Sugar Company was already out of business as a going concern at the time of the sale and nothing which the Utah-Idaho Sugar Company did or could do as a bidder or purchaser, in any way furthered or aided the failure or insolvency of said Company. The Beet Growers Company had ceased to function shortly after July 1, 1922, when plaintiff filed its complaint in the present action.

Attention is respectfully directed to the paragraph numbered four, page 200 of the printed transcript, which is a part of the order of the Federal Trade Commission to cease and desist. This order forbids the Utah-Idaho Company "to purchase land and erect factories," when "such purchases or erections are not done in good faith." In order to uphold appellant in its position that the Utah-Idaho Company was not a competent bidder, other questions aside, this Court must find that the purchaser did not act in good faith.

No proof of any fact was offered in the lower court at the hearing on the receiver's report of his sale. So that there is nothing in the record tending to establish want of good faith.

CONCLUSION

It is respectfully submitted that appellant has come short of showing any error in the proceedings appealed from, and that the judgment of the District Court for the State of Idaho in the premises should be affirmed and the said appeal dismissed with costs to the appellee as provided by the rules and practice of this court.

Respectfully submitted,

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INDEX AND TABLE OF AUTHORITIES CITED.

List of Authorities Cited: